

Decision 02-05-011

May 2, 2002

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion Into the Operations, Marketing and Sales Practices of GTE California to Determine Whether the Commission Was Misled or Supplied Incomplete Information in Connection With Assessing the Extent of Abusive Marketing by GTEC's Foreign Language Assistance Center, etc.

Investigation 98-02-025  
(Filed February 19, 1998)

**ORDER DENYING APPLICATION FOR REHEARING AND  
MODIFYING DECISION 00-04-003**

**I. BACKGROUND**

On April 6, 2000, we issued Decision (D.) 00-04-003, which ruled on the requests of the Greenlining Institute and the Latino Issues Forum (jointly referred to as Intervenors) for compensation for contributions to D.98-12-084. The proceeding stemmed from an investigation into abusive marketing practices at GTE California Inc.'s (now Verizon) Foreign Language Assistance Center. Along with their request, Intervenors filed a motion to file confidential material under seal, which was granted by D.00-04-003 (Decision). The information submitted under seal consisted of documents prepared by attorneys at three law firms setting forth the hourly billing rates charged for the services of attorneys with varying levels of experience. Verizon protested certain of the hourly rates requested by the Intervenors.

The Decision granted the request for compensation, but found that the hourly rates sought for some Intervenor attorneys were in excess of rates previously allowed for similar time periods. While the Intervenors submitted

declarations containing information about the market rates charged by private law firm attorneys of equivalent experience, skill, and expertise to support the requested rates, they did not provide information on previously adopted rates for attorneys and staff, as requested by a previous Commission decision. The Decision noted that it was the Commission's policy to establish hourly rates for an individual for a specific time period, and to apply that rate when similar services are performed over a substantially similar time period. The Decision used rates adopted in D.98-12-048 for services performed in 1998 by attorneys Gnaizda, Gamboa, Rodriguez, and Brown (the work subject to the instant request was also performed in 1998), and used the rate adopted in D.98-12-058 for Ms. Berrio.

Intervenors filed a timely application for rehearing of D.00-04-003. On November 19, 2001, Intervenors also filed a petition to modify D.00-04-003. For the reasons discussed below, we deny Intervenors application for rehearing, as we do not find legal error in the Decision. However, in response to the petition to modify, we have thoroughly reviewed the rates that we adopted for Intervenors' work performed in 1998 and as a result, we modify the Decision to adjust the hourly rates awarded for work performed in 1998.

## **II. DISCUSSION**

In their application for rehearing, Intervenors allege that the Decision failed to follow the standards stated in Public Utilities Code section 1806, which provides:

The computation of compensation awarded pursuant to section 1804 shall take into consideration the market rates paid to persons of comparable training and experience who offer similar services. The compensation awarded may not, in any case, exceed the comparable market rate for services paid by the commission or the public utility, whichever is greater, to persons of comparable training and experience who are offering similar services.

According to Intervenor, the Commission failed to consider the market rate evidence and instead relied on rates set in prior decisions, which also allegedly ignored market rates. Intervenor argues that by relying on the earlier decisions, the Commission embraced a line of cases and theory of two-tiered attorney rates which has been rejected by the California Supreme Court in Serrano v. Unruh (1982) 32 Cal.2d 621, 643, n.40. That theory, as Intervenor characterizes it, is the notion that “satisfaction from advocacy performed in the more noble aspirations of the legal profession” is compensation enough for public interest attorneys. We are not persuaded by Intervenor’s arguments. The Commission has considerable discretion in determining the appropriate hourly rate for attorneys appearing before it. Section 1806 requires the Commission to consider “market rates” in awarding compensation. It does not mandate that we set compensation rates in lock step with those commanded by attorneys employed by private law firms. Moreover, evidence of prevailing hourly rates at private law firms does not paint a complete picture of the rates paid to legal professionals that practice before the Commission. As we have indicated in the past, consideration of legal professionals employed by the Commission and internal staff of the utilities are also factors in calculating the “market rate.” (See e.g., Re Alternative Regulatory Frameworks for Local Exchange Carriers, D.95-08-051, 61 CPUC 2d 142, 147 n.2.) In addition, market rates are just one factor we look at in determining whether compensation is reasonable. We also consider other factors including the complexity of the proceedings, the skill level of the attorneys and staff involved, and the fact that these costs are borne by the ratepayers.

Contrary to Intervenor’s claims, the evidence submitted by Intervenor was considered and we were not persuaded to change the hourly rates previously adopted for Intervenor’s attorneys. Intervenor argues that relying on past Commission decisions is in error as those decisions also failed to consider market rates. While we do not intend to provide Intervenor the opportunity to collaterally attack decisions that have long ago become final, Intervenor’s claim

simply is not true. For example, D.98-12-048 not only considered an annual survey of the billing rates of San Francisco law firms (“Of Counsel” Survey), it also discussed a declaration of an attorney practicing in San Francisco submitted by Greenlining/LIF. (D.98-12-048, mimeo, at 16-17, 30-31.) Decision 98-12-058, which set Ms. Berrio’s initial rate, also considered the Of Counsel Survey as well as declarations submitted by Greenlining/LIF in determining whether to increase their attorneys’ rates. As these decisions demonstrate, the rates awarded Intervenors are reviewed regularly and methodically, and are based on a consideration of market rates.

Intervenors’ argument that this Decision embraces a line of Commission cases infected by the disreputed “charity of counsel” theory is also unavailing. While this rationale was expressed (for the first time) in D.95-08-051, it was later repudiated by the Commission upon reconsideration in D.97-05-098 (Order On Rehearing of Decision 95-08-051.) Intervenors claim that the Commission continues to implicitly rely on this theory, but fail to present compelling arguments how this is so.

Intervenors also ask the Commission to reconsider the practice of halving compensation paid for preparing fee requests. Specifically, they claim that this practice was inappropriate as to the hours claimed by Ms. Brown in preparing the fee request due to the complexity of the document. We noted that some of the hours claimed by Ms. Brown were for standard activities related to preparation of a compensation request. We have previously stated that compensation requests are essentially bills for services and do not require a lawyer’s skill to prepare. However, we did not reduce the fee for two hours of Ms. Brown’s time, in recognition of the possibility that some amount of attorney time may have been necessary in preparing the declaration of Richard Pearl. Intervenors present no persuasive arguments for their claim of legal error.

Intervenors also offer several policy arguments in favor of their request for increasing compensation rates. However, none of these arguments demonstrate legal error in the Decision.

Intervenors also filed a petition to modify D.00-04-003 that raises many of the same arguments as their application for rehearing. Although we conclude that no legal error exists, we take this opportunity to review the rates that we adopted for work performed in 1998.

In evaluating Intervenors' request that we modify their rates, we first review D.96-08-040, which established rates for attorneys Gnaizda and Brown and expert Gamboa. In that decision we evaluated the experience levels of these three practitioners in comparison to other practitioners appearing before the Commission. Gnaizda was identified as one of the top tier of attorneys appearing before the Commission at the time. The decision further stated that Gnaizda should be compensated at a rate comparable to Florio of The Utility Reform Network (TURN). We found that Brown's experience placed her in the second tier of attorneys appearing before us and we set an hourly rate for her at the upper end of the range of rates adopted for practitioners with similar experience levels. For expert Gamboa, we reviewed the type of services he had provided and compared those services to other intervenors in the proceeding. Based on his experience and the services provided, we set Gamboa's rate at the highest rate of compensation approved for policy experts. With this framework in mind, we look anew at Intervenors' hourly rate requests for 1998.

In this case, Intervenors requested that first year attorney Berrio be compensated at \$125/hour. In D.00-04-003, the Commission awarded \$85/hour, relying in part on D.98-12-058, which awarded Berrio \$85/hour in her first case before the Commission. In D.98-12-058, we compared Berrio to UCAN first year attorney Carbone, who had requested, and been awarded, \$80/hour in his first year of practice. In other decisions that awarded rates in the 1996 through 1998 timeframe, other first year attorneys were awarded rates closer to the \$125/hour

rate requested by Berrio (e.g., Fraser was awarded \$120/hour in 1996 and 1997 in D.98-04-025, Migacz was awarded \$125/hour in 1996 through 1998 in D.99-04-023). Therefore, we will establish a 1998 rate for Berrio of \$125/hour.

For 1998, Intervenor requested that attorney Brown be compensated at \$260/hour. The Commission awarded compensation at an hourly rate of \$250/hour. In setting Brown's 1995 rate in D.96-08-040, we compared her to Cavanagh, Finkelstein, and Steck-Myers, other attorneys appearing before us during the same timeframe. These attorneys were described as highly experienced attorneys, but not the most experienced practitioners, for whom we set rates between \$200/hour and \$235/hour. Brown's rate for that same year was set at \$225/hour. TURN Attorney Long also falls into this tier of practitioners; in 1995 his rate was set at \$225/hour. In 1998 we set a rate for Finkelstein of \$250/hour and compensated Long at a rate of \$260/hour. Clearly the \$250/hour rate we adopted for Brown is consistent with the rates we adopted for other attorneys in this tier of practitioners. Within a group of practitioners with similar levels of experience there are often minor differences in hourly rates, for example, based on frequency of appearance and the frequency with which increases in hourly rates are sought. Brown is one of the most experienced practitioners in this tier of attorneys and therefore, we find it appropriate to compensate her at \$260/hour for 1998, consistent with the rate we adopted for TURN's Long during the same year and the highest rate awarded to this tier of attorneys.

In D.96-08-040 we compared attorney Gnaizda to Florio and set both of their rates at \$260/hour in 1996, the highest compensation rate awarded to any intervenor under this program up to that time. In 1998, Florio requested, and received, an increase in his rate of compensation to \$290/hour. Gnaizda requested an increase to \$375/hour and received an increase to \$270/hour. The awarded rate was on the high end of rates awarded by the Commission at the time, and within the range of rates identified in the *Of Counsel* survey to support an increase. However, because we have previously identified Gnaizda and Florio as peers for

purposes of setting compensation rates, we will likewise do so here. We adopt a rate of \$290/hour for Gnaizda for 1998.

After reviewing other decisions awarding rates during the same time period, we find that these rate changes for Intervenors' counsel are justified by a comparison to rates awarded to their peers practicing before the Commission. The rates are further supported by the billing rate ranges of California attorneys set forth in the *Of Counsel* survey.

We next turn to Intervenors' experts, Rodriguez and Gamboa. In D.00-04-003 we awarded Rodriguez \$105/hour, Intervenors request no change to this rate. Intervenors request compensation at a rate of \$250/hour for Gamboa. Although Intervenors argue that Gamboa would command a billing rate of \$250/hour, Intervenors present no evidence of billing rates for persons of comparable experience who provide similar services to Gamboa. We awarded compensation to Gamboa at the rate of \$135/hour, despite the inadequacy of the showing justifying a rate increase, to account for the fact that we had not authorized an increase in Gamboa's rate since 1994.

In this proceeding, Gamboa participated in his capacity as Executive Director of Greenlining Institute, providing policy direction and analysis. In D.96-08-040, we adopted rates for several executive directors of various intervenors that performed similar roles as Gamboa. The only executive directors to seek awards since that decision are Gamboa and Boccadoro. In D.00-09-068, Boccadoro was awarded the rate he requested for work performed in 1998 through 2000, \$125/hour, the same rate he has been awarded since 1995. Other experts have received higher rates than the \$135/hour awarded to Gamboa in D.00-04-003, but they have provided different services from those provided by Gamboa. Experts provide different services to the market, for example witness Marcus has performed technical economic modeling and witness Hagadorn has performed technical analysis of technological options in the market, which are distinct

services from providing in-house policy direction.<sup>1</sup> Given the services rendered and the limited justification for the requested rate provided by Intervenors, we do not modify the \$135/hour rate awarded to Gamboa in 1998.

### III. FLOW THROUGH OF HOURLY RATE CHANGES

The chart below reflects the revised rates to arrive at a new award. There are no changes for Gamboa, Rodriguez, and Other Costs. The result is an increase of \$11,938.50 as compared to the award as set forth on page 20 of D.00-04-003. Verizon shall, within 30 days of this order, pay Intervenors \$11,938.50 plus interest as the rate earned on prime, three-month commercial paper as reported in the Federal Reserve Statistical Release G.13, with interest beginning on April 27, 1999, and continuing until full payment has been made.

#### ADJUSTMENT BASED ON REVISED RATES FOR D.00-04-003

Gnaizda	134.4	\$ 290.00	\$ 38,976.00
Brown	139.4	\$ 260.00	\$ 36,244.00
Brown (Compensation)	10.5	\$ 130.00	\$ 1,365.00
Berrio	195.1	\$ 125.00	\$ 24,387.50
Gamboa	39.55	\$ 135.00	\$ 5,339.25
Rodriguez	22.85	\$ 105.00	\$ 2,399.25
		subtotal	\$108,711.00
Other Costs			\$ 682.41
			\$109,393.41

Several decisions resolving intervenor compensation claims by Greenlining Institute and Latino Issues Forum, either jointly or individually, have been issued since D.00-04-003 was adopted.<sup>2</sup> In some cases these subsequent decisions (identified below) have relied on the rates adopted in D.00-04-003 to set

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<sup>1</sup> Marcus was awarded \$145/hour in 1997 and 1998. Hargadon was awarded \$250/hour in 1997 and 1999.

<sup>2</sup> The decisions that have been adopted since D.00-04-003 was adopted are D.00-04-011, D.01-09-011, D.01-09-045, D.01-11-011, and D.02-02-024.



1998 rates or as the underlying basis for 1999, 2000, or 2001 rates. Today's decision modifying D.00-04-003 requires that we revisit those decisions issued after D.00-04-003, which based hourly rates on those set in D.00-04-003 as originally issued. Therefore, we direct the ALJ Division to issue proposed revisions to D.00-04-011, D.01-09-011, D.01-09-045, D.01-11-011, and D.02-02-024 utilizing the 1998 rates we adopt today and to modify subsequent annual hourly rates as appropriate. The proposed revisions will be served together with a copy of this decision on the appropriate service lists for R.98-12-015, R.97-08-001/I.97-08-002, R.98-12-005, I.00-08-003, and R.98-09-005.

**IT IS ORDERED** that:

1. Greenlining/Latino Issues Forum's Application for Rehearing of Decision 00-04-003 is denied.
2. D.00-04-003 is modified as follows:
  - A 1998 billing rate of \$290/hour is awarded to Gnaizda;
  - A 1998 billing rate of \$260/hour is awarded to Brown;
  - A 1998 billing rate of \$125/hour is awarded to Berrio; and
  - Greenlining/Latino Issues Forum are jointly awarded an additional \$11,938.50 in compensation for their substantial contribution to Decision 98-12-084, bringing the total award to \$109,393.41.
3. Verizon shall, within 30 days of this order, pay Intervenor \$11,938.50 plus interest as the rate earned on prime, three-month commercial paper as reported in the Federal Reserve Statistical Release G.13, with interest beginning on April 27, 1999, and continuing until full payment has been made.
4. ALJ Division shall issue proposed revisions to D.00-04-011, D.01-09-011, D.01-09-045, D.01-11-011, and D.02-02-024 utilizing the 1998 rates we adopt today and modifying subsequent annual hourly rates as appropriate and serve the proposed revisions, together with a copy of this decision, on the

appropriate service lists for R.98-12-015, R.97-08-001/I.97-08-002, R.98-12-005, I.00-08-003, and R.98-09-005.

5. This proceeding is closed.

This order is effective today.

Dated May 2, 2002 at San Francisco, California.

LORETTA M. LYNCH  
President  
HENRY M. DUQUE  
CARL W. WOOD  
GEOFFREY F. BROWN  
MICHAEL R. PEEVEY  
Commissioners